IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.20528 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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ANI ELASTIC INDUSTRIES THRO' KANTILAL T PATEL-Petitioner(s)
Versus
UNION OF INDIA THRO' ASST.SOLICITOR GENERAL & 4 - Respondent(s)

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Appearance :
MR PR NANAVATI for Petitioner(s) : 1,
MR JITENDRA MALKAN for Respondent(s) : 1-4
MR SN THAKKAR for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 16/12/2005
ORAL JUDGMENT
(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. Heard Mr.P.R.Nanavati, learned advocate for the petitioner, Mr.Jitendra Malkan for respondent

Nos.1 to 4 and Mr.S.N.Thakkar for respondent No.5.

2. RULE. Mr.Jitendra Malkan waives service on behalf of respondents No.1 to 4 and Mr.S.N.Thakkar waives service on behalf of respondent No.5. Considering the nature of the controversy involved in the petition, the matter is taken up for final hearing and disposal today.

3. By this petition, under Articles 226 and 227 of the Constitution of India, the petitioner primarily challenges the Order-in-Original No. CCE-III/TRC/01/ANI/ELASTIC/COMMR/2005-06 dated 22nd September, 2005 passed by the Commissioner, Central Excise-III, respondent No.2 herein.

4. The facts briefly stated are that the petitioner is a proprietary concern engaged in the manufacturing of Elastic Tapes of various kinds. The petitioner purchased manufacturing unit No.2005/A G.I.D.C., Chhatral held by the

erstwhile unit M/s. Urmi Enterprise in an auction held by the Gujarat State Financial Corporation (GSFC) in July, 1999.

5. After a period of about five years, from the date of the purchase of the aforesaid manufacturing unit, the petitioner was served with a notice dated 11th October, 2004 issued by the respondent No.4, calling upon the petitioner to pay up the government dues of M/s. Urmi Enterprise within 10 days, failing which action would be taken against the petitioner under Section 11 of the Central Excise Act, 1944 (the Act).

6. It is the case of the petitioner that it had submitted a reply dated 15th October, 2004 through hand delivery as well as Registered A.D. Post. However, the petitioner was orally threatened that if the amount towards duty as demanded was not deposited, the respondent No.4 would proceed to attach the property as well as

machinery of the petitioner towards the duty liability of M/s. Urmi Enterprise. In the circumstances, the petitioner was constrained to approach this Court by way of a writ petition being Special Civil Application No.14075 of 2004. By a judgment and order dated 25th October, 2004 the aforesaid petition was disposed of by permitting the petitioner to withdraw the petition with liberty to make a representation before the concerned Commissioner. It was further directed that the respondents shall not proceed further with the impugned show cause notice till the representation made by the petitioner against the said show cause notice is decided by the Commissioner.

7. Pursuant to the aforesaid order of this Court, the petitioner made a representation dated 22nd November, 2004. After hearing the petitioner, respondent No.2, Commissioner of Central Excise, passed the impugned order rejecting the representation of the petitioner and directing

the Superintendent of Central Excise to recover the amount of Rs.35,23,990.72 by way of attachment of plant and machinery, excisable goods, materials, preparations, vessels, utensils etc. which originally belonged to M/s. Urmi Enterprise and which are now in custody of M/s. Ani Elastics Industries. It is this Order-in-Original which is subject matter of challenge in the present petition.

8. On 27th October, 2005, this Court had passed the following order:

> “Mr.Malkan appearing on behalf of the respondent authorities states that Notice has been served only on 24.10.2005 and hence, he prays for time to obtain instructions and file reply, if necessary. Affidavit-in-reply, if any, to be filed on or before 25.11.2005. Rejoinder, if any, to be tendered on or before 2-12-2005. Matter to be listed on 9-12-2005. In the meantime, Ad-interim relief granted earlier to continue till further orders.

9. Thereafter on 9th December, 2005 the matter was adjourned to 16th December, 2005. However, till date no return has been filed on behalf of the respondents controverting the facts stated in the petition. Therefore, it can be safely presumed that the averments made in the petition, more particularly in Paragraph Nos.3.6 and 3.7 thereof are correct. In Paragraph No.3.6 of the petition it has been averred that the product of the petitioner is different from the product which was manufactured by the erstwhile owner M/s. Urmi Enterprise and the machineries which were purchased are not usable for the purpose of manufacturing the product which is manufactured by the petitioner and are lying idle as scrap.

10. Mr.P.R.Nanavati, learned advocate for the petitioner, has contended that the notice dated 11th October, 2004, pursuant to which the impugned order has been made does not fall within the purview of the amended proviso to

Section 11 of the Act and respondent No.4 has no jurisdiction to seal or attach the machineries of the petitioner which were not held by the erstwhile unit and were not purchased at the said auction. It was submitted that the amendment introduced by the Finance Act, 2004 in Section 11 of the Central Excise Act cannot be made effective retrospectively for recovery of duty prior to 1999. It was submitted that the impugned action of the respondents in seeking to recover dues of the year 1998 of the erstwhile unit by resorting to the amended provisions of the Act which had been brought on the statute book in 2004 was barred by the law of limitation as under the provisions of the Act it is not permissible for the respondents to recover duty after the lapse of a period of five years. It was further submitted that the petitioner was put in possession of the assets of the erstwhile unit w.e.f. 30th August, 1999 and, therefore, the respondents could not recover duty beyond a period of five years particularly when the

liability of the excise duty of the erstwhile owner was admittedly prior to August, 1999.

11. Reliance was placed upon a decision of this Court in the case of Sweta Gupta Vs. Union of India, Special Civil Application No.15232 of 2004, decided on 10th March, 2005 to submit that the controversy in issue as regards applicability of the proviso to Section 11 of the Act stands concluded in favour of the petitioner. Reliance was also placed upon a decision of the Apex Court in the case of State of Gujarat Vs. Patil Raghav Natha & Ors, 1969 (2) SCC 187, to contend that it is the case of the respondents that Section 11 does not prescribe any time limit for taking action thereunder, however, it is settled legal position that even in case where no period of limitation has been prescribed under the provisions of the Act, the same must be exercised within a reasonable time. In conclusion, it was submitted that the action

sought to be taken by the respondents, of recovering the dues of M/s. Urmi Enterprise from the petitioner being much beyond a reasonable period, was hopelessly time barred and as such the impugned order is required to be quashed and set aside and the respondents are required to be restrained from proceeding against the petitioner in connection with the outstanding duty liability of M/s. Urmi Enterprise.

12. Mr.Malkan, appearing on behalf of the respondents, was not in a position to dispute any of the contentions raised on behalf of the petitioner. It was submitted that the Court may pass appropriate orders in the matter.

13. As can be seen from the impugned order dated 22nd September, 2005, the Commissioner of Central Excise has held that recovery proceedings can be initiated under the amended Section 11 of the Act even though dues may have arisen earlier and that such action does not amount to giving

retrospective effect to the amendment. It has also been held that Section 11 of the Act, under which the present proceedings are taken, does not prescribe any time limit for taking action thereunder.

14. It is an admitted position that the petitioner has purchased the manufacturing unit belonging to erstwhile M/s. Urmi Enterprise in an auction held by the respondent No.5 in the year 1999. The impugned order bears out the fact that the dues of M/s. Urmi Enterprise have arisen by virtue of an Order-in-Original dated 8th January, 1998, i.e. more than one and a half year prior to the purchase of the unit by the petitioner. Action has been initiated for recovery of the dues of M/s. Urmi Enterprise from the petitioner by a notice dated 11th October, 2004 which is beyond a period of five years from the date of purchase of the unit by the petitioner. It is a settled legal position that when a power is conferred by a statute without mentioning the

period within which it could be invoked, the same has to be done within a reasonable period, as all powers must be exercised reasonably, and exercise of the same within a reasonable period would be a facet of reasonableness. In the present case, assuming that it is permissible for the respondents to take action under the proviso of Section 11 of the Act in respect of dues which have crystallized prior to the introduction of the proviso to Section 11 of the Act vide the Finance Act, 2004, even then as held by the Apex Court in a catena of decisions such action has to be taken within a reasonable time. In the case of State of Gujarat Vs. Patil Raghav Natha (supra) the Apex Court has held that when there is no period of limitation prescribed, the power must be exercised within reasonable time. In the said case the power exercised beyond a period of one year was held to have been exercised beyond a reasonable time. In the circumstances, this Court is not satisfied that the respondents have exercised

powers under Section 11 of the Act within a reasonable period of time. The lapse of a period of five years in seeking to recover the dues of the erstwhile unit from the auction purchaser, namely, the petitioner, is certainly not a reasonable time for exercise of power, even if it is not hedged in by a period of limitation. Therefore, the impugned order cannot be permitted to stand.

15. In the result, the petition is allowed. The impugned order dated 22nd September, 2005 (Annexure-A) is hereby quashed and set aside. Rule made absolute accordingly, with no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**